

Electrical Specialties, Inc. and International Brotherhood of Electrical Workers Local Union No. 855, a/w International Brotherhood of Electrical Workers, AFL-CIO. Case 25-CA-23703

May 9, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On November 25, 1996, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Electrical Specialties, Inc., Muncie, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's description of its reason for terminating employees Jeff Peters and Brian Gulley. We find that the judge's initial description erroneously indicates that the Respondent ostensibly terminated them for falsifying their timesheets. The judge's further discussion, however, clarifies that the Respondent's proffered reason for their dismissal was for approving timecards submitted by other employees that overstated the time the employees actually worked.

Norton B. Roberts and Ann Rybolt, Esqs., for the General Counsel.

Jack H. Rogers, Esq. (Barnes & Thornburg), of Indianapolis, Indiana, for the Respondent.

Ron Dunmoyer, of Muncie, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Muncie, Indiana, on July 8-9, 1996, on a complaint dated May 31, 1995, as amended June 28, 1996. The charge was filed by International Brotherhood of Electrical Workers Local Union No. 855, a/w International Brotherhood of Electrical Workers, AFL-CIO (the Union) on January 20, 1995. The issues are whether the Respondent, Electrical Specialties, Inc., violated Section 8(a)(1) and (3) of the

National Labor Relations Act (the Act) by discharging its employees Brian Gulley and Jeff Peters, because of their union and concerted activities and whether the Respondent violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals and plant closure if they selected the Union as their bargaining agent.

The Respondent filed a timely answer, admitting the jurisdictional allegations and the supervisory status of Jeff Payne, vice president, and Jaret Siefert, general foreman, and denying the commission of any unfair labor practices.

On the entire record in this case, including my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Electrical Specialties, Inc., with an office and place of business in Muncie, Indiana, is an electrical contractor doing residential, industrial, and commercial construction. With purchase and receipts in excess of \$50,000 directly from points outside the State of Indiana, the Company is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

A. Background

Electrical Specialties, Inc., owned and operated by Jeff Payne and his wife, performed electrical work in Indiana and other parts of the United States with an electrical work force of 15 to 20 electricians. The typical workday consisted of 8-1/2 hours which included one-half hour for lunch which was unpaid and two 15-minute breaks which were paid. The employees were accordingly paid for an 8-hour day.

In late 1993, the Respondent began work on the Pittenger Student Center located on the campus of Ball State University. The work there was concluded in December 1994. Initially, the Respondent assigned Jeff Peters as job leader. Subsequently Brian Gulley was also assigned to that job as a leadman. Peters worked at the Pittenger jobsite from December 1993 until August or September 1994, and Gulley worked there until approximately May 1994. Both men worked at other projects after the Pittenger job.

In October 1994, Gulley decided to call the Union with a view toward organizing the employees. He called Local Union No. 855 and made contact with Ron Dunmoyer, the union organizer. On November 16, 1994, Gulley signed a union authorization card and began to distribute blank cards to his fellow employees. He contacted about six or seven employees, including Peters who also signed an authorization card on November 16 (G.C. Exhs. 6, 8). Peters joined Gulley in speaking to other employees about the Union.

Within 2 weeks, the Respondent discharged both Peters and Gulley, ostensibly because they had falsified their timecards while they worked at the Pittenger project several months before.

The General Counsel argues that the Respondent discharged the two employees because of their union activity and that certain remarks made by Jeff Payne at a Christmas party in 1995 violated Section 8(a)(1) of the Act. The Re-

spondent argues that the Respondent had no knowledge of the employees' union activity, that the two employees were fired for legitimate reasons, and that both employees were supervisors within the meaning of Section 2(11) of the Act.

B. Discussion

The General Counsel's prima facie case is fully supported by the record. Peters and Gulley admittedly engaged in union activity. Management had knowledge of their union activities at the time of their discharges. On November 27, 1994, Scott Smith who was employed by the Respondent as job foreman had at telephone conversation with Jaret Siefert, general foreman and, according to the Respondent, a supervisor within the meaning of Section 2(11) of the Act. Smith testified as follows about his conversation with Siefert (Tr. 221):

And he [Siefert] told me that we was getting organized, or we was trying to get organized, that Brian Gulley and Jeff Peters were organizing or talking to people.

Smith traveled to California on that day and testified that he called Jeff Payne on the following day, November 28, from his hotel room to discuss his work assignment in California.¹ During that conversation Smith asked Payne whether he had heard that Peters and Gulley were trying to organize. Payne replied that he was in a state of shock, that he did not believe it and that he did not want to discuss it. Payne also said that he "let a couple of guys go today" in an obvious reference to Peters and Gulley (Tr. 227).

Payne certainly knew that the Union was interested in organizing the Company. On November 21, 1994, Dunmoyer visited the Company's offices and spoke with Payne about the Union and his objections to the Union. In a small shop atmosphere, Payne must have known about the employees' efforts to organize. I simply cannot accept Payne's testimony to the contrary.

The General Counsel points with justification to the timing of the discharges. Not only were both union activists fired within a few minutes of one another, but also on November 28, less than 2 weeks following their signing of the union authorization cards. Both employees were highly regarded who had worked for the company for several years without any disciplinary record. Significantly, the record shows that the reasons for the discharges were pretextual and highly implausible.

The Respondent would have one believe that two of its best electricians working as job leaders or leadmen who had no prior disciplinary history were fired for certain conduct which happened months prior to November 28. Respondent's reasons were falsification of timecards. The employees' timecards showed that the employees worked from 7 a.m. to 3 p.m. They were paid for the full 8 hours, because the employees had decided either to forego the two 15-minute paid breaks and have a 30-minute unpaid lunch or to take the breaks and work through the lunchbreak. Payne testified that he was aware of this practice for the 2 years beginning in 1992 and that he had approved it. At some point in time,

however, Payne suspected that some employees began to assume that they enjoyed two paid breaks and a paid 30-minute lunch, because he had seen some employees away from their workstation taking a break or lunch on 10 or 20 occasions in February and March and again in May and June 1994. He failed to take any corrective action. Payne conceded, "[I]t was usually normal for people to work from 7 a.m. to 3 p.m. and most of the time they didn't take their lunch when they worked those hours." Payne testified that he spoke to Gulley and Peters about the work tickets of those employees who were observed taking breaks at odd times when they should be working. According to Payne, both Gulley and Peters assured him that these employees were not taking both the lunch as well as the morning and afternoon breaks. Payne accepted the assurances at that time and did not pursue the issue. He obviously could have given orders to the employees to work until 3:30 p.m. or to discontinue their practice of skipping the breaks. Months later, without any provocation, Payne resurrected the issue, blamed not the employees who were observed on these 10 or 20 occasions, but Peters and Gulley for starting a practice which Payne said had spread throughout the Company. Payne blamed them not only for the practices on the Pittenger project but also for the practices on other jobsites, because he "could see the consistency of all other job tickets that everything was either from 7:00 to 3:00 . . . or 8:00 to 4:00," namely an 8-hour day (Tr. 337). According to Payne, "Nobody was writing down lunch anymore." He accordingly called Gulley into his office on November 28 and accused him of starting the practice, saying (Tr. 338):

And even after I observed it and told you that I was observing it, you told me that it wasn't a problem. You didn't think it was a problem.

Payne further told Gulley at the meeting that he could have stopped the practice, nipped it in the bud by talking to everybody, but the whole company was now practicing "what you guys started." Payne testified that he told Gulley that he and Peters had been with the Company the longest and were two of his best men, his best employees, but that he had to terminate their employment, "since everybody else looks up to you, I have to make an example out of you two" (Tr. 339). Following his conversation with Gulley, Payne described how he called in Peters and followed the same scenario with Peters as he did with Gulley. Payne described the conversation as very emotional, "[I]t was real sad for both of us . . . we both were real upset . . . and pretty tearful; . . . it wouldn't be fair to fire Brian and not you" (Tr. 342). Payne testified that both Peters and Gulley admitted to the problem during their conversations. Yet even under Respondent's scenario, there was no direct accusation that either Peters or Gulley had violated the policy or cheated on their own timecards, but rather that they had tolerated the abuse by others when they approved their timecards.

Payne's testimony and his justification defies credulity. With a work force of no more than 15 to 20 employees, Payne could easily have taken appropriate action and given orders to put an end to an undesirable practice on the job. Instead of firing his best employees as examples to the others, he could have applied the Company's progressive discipline procedure to the offenders. Payne obviously ignored

¹ Citing telephone records, the Respondent attempted to show that Smith's telephone conversation occurred on December 6 (R. Exh. 9). Smith testified that he did not use the MCI "800" number (R. Exh. 9), because he did not know it. I have credited Smith's testimony.

the Company's discipline procedure in an effort to rid itself of the two union activists. Moreover, the Respondent's argument that it would have terminated their employment even in the absence of their union involvement is wholly unconvincing.² The pretextual nature of Respondent's action is so clear that this scenario does not even present a credible dual motive issue.

Respondent's further argument that Gulley and Payne are not protected by the Act, because they were supervisors within the meaning of Section 2(11) of the Act, has little basis in the record. As job leaders or leadmen on the Pittenger job with two to six employees, Gulley and Peters had no authority to transfer employees, grant wage increases, assign work and responsibly direct other employees. The record clearly shows that these employees had no authority to hire, fire, suspend, lay off, recall, promote, reward or discipline other employees, or to adjust their grievances. Peters made one attempt to recommend the hiring of an individual, but his recommendation was rejected. It is well settled that the authority of a leadman on a job ordinarily does not qualify him to the level of a supervisor. Here, the Respondent would have employed 10 supervisors out of a total of 12 electricians in November 1994, because all of them with the exception of 2 had been assigned the leadman's role at one time or another. In addition, the Respondent employed three helpers and one service technician. Neither Gulley nor Peters received higher pay as a result of the leadman's positions. They worked 80 to 90 percent with their tools alongside other electricians and functioned at some projects not as leadmen but like other electricians assigned to a job.

In their roles as job leaders on the Pittenger job, as well as on subsequent assignments, Gulley and Peters laid out the work pursuant to the general contractor's specification, they ordered materials, signed purchase orders and directed the other electricians to do the work in accordance with the specifications. On occasion, they would attend the site meetings which subcontractors and contractors attended. From time to time, Gulley and Peters have requested additional employees on the job. Under those circumstances they simply contacted Payne who usually granted their request.³ Similarly with requests for overtime, they needed the prior authorization from Payne or other supervisors. Clearly, their assignments of work to other employees were based upon the existing specifications and were routine in nature. They did not have a supervisor's discretion, nor the authority to select the employees. That decision was made by Payne. Leadmen had no authority to discipline other employees or to adjust their grievances. Payne would conduct an investigation as he did with the timecard issue. Leadmen did not authorize leave to other employees. Their function to sign timecards was clearly a routine performance. The authority to order materials for the job was circumscribed and obviously based upon a routine appraisal of existing supplies. In short, the record is clear, neither Gulley nor Peters were supervisors within the meaning of Section 2(11) of the Act.

On the basis of the foregoing and the record in this case, I find that the Respondent violated Section 8(a)(3) and (1) of the Act when it fired the two employees.

² Relying on *Wright Line*, 251 NLRB 1083 (1980).

³ Gulley's job responsibilities increased somewhat while he worked in the Connersville K-mart job.

This conclusion is supported by remarks made at a Christmas party on December 23, 1994. Scott Smith attended the party along with other employees, family members of employees, suppliers, as well as Payne's wife and daughter. The gathering was obviously a social function. Nevertheless, the subject of conversation turned to the Union. Payne was overheard as saying:

If you guys vote the Union in, they're . . . because I'm going to shut down the shop. Nobody is going to f—k with my livelihood. (Tr. 233.)

Payne admitted talking about the Union but he recalled merely saying that he did not want any monkey on his back while running his business and that he did not want anybody else telling him how to run his business. Although I believe that Payne would not have used the obscene language attributed to him during such an event, I credit Smith's recollection that Payne threatened union activists with the loss of their jobs. Clearly such threats were in line with Payne's earlier remarks in 1991 when the Union made an attempt to organize the facility and Peters and Gulley overheard him express similar threats. I accordingly find that the Respondent's threats of plant closure violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Electrical Specialties, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers Local Union No. 855, a/w International Brotherhood of Electrical Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with reprisals and plant closure because the employees were engaged in union activities, the Respondent has violated Section 8(a)(1) of the Act.

4. By discharging Brian Gulley and Jeff Peters because of their concerted and union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged Brian Gulley and Jeff Peters, the Respondent shall be ordered to offer them reinstatement to their jobs they previously performed or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed. Further, the Respondent shall be ordered to make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent also shall be ordered to post a notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Electrical Specialties, Inc., Muncie, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Electrical Workers Local Union No. 855, a/w International Brotherhood of Electrical Workers, AFL-CIO, or any other union.

(b) Threatening employees with reprisals and plant closure because the employees engaged in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate policies of the Act.

(a) Within 14 days from the date of this Order, offer Brian Gulley and Jeff Peters full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Brian Gulley and Jeff Peters whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this had been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Muncie, Indiana, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Brotherhood of Electrical Workers Local Union No. 855, a/w International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization.

WE WILL NOT threaten you with reprisals or plant closure because you support or engage in any activities on behalf of the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Brian Gulley and Jeff Peters full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Brian Gulley and Jeff Peters whole for any loss of earnings and other benefits resulting from this discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Brian Gulley and Jeff Peters, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ELECTRICAL SPECIALTIES, INC.